No. 14,492

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYMOND J. KASPER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S REPLY BRIEF.

DAVIS & COLVIN,
REYNOLD H. COLVIN,
SIDNEY FEINBERG,
1095 Market Street, San Francisco 3, California,
Attorneys for Appellant.

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APPELLANT'S REPLY BRIEF.

I. THE TESTIMONY OF MRS. HAVELL, APPELLANT'S AUNT, DOES NOT CONTRADICT APPELLANT'S TESTIMONY AS TO THE GIFT OF $12,000.00 FROM HIS MOTHER.

Preliminarily, it is necessary to correct an erroneous conclusion drawn by appellee from the record.

At page 3 of its brief, appellee says that appellant's aunt, Mrs. Havell, called as a witness for appellant, refuted appellant's testimony that his mother had given him $12,000.00 in order to equalize a gift of three houses by the mother to appellant's sister. Mrs. Havell's testimony shows that on appellant's mother's

death, there were five houses in her estate; three went to the mother's husband, one to appellant, and one to appellant's sister. However, upon the death of the husband the three houses he inherited were to go and did go to appellant's sister. (R. Vol. 5, 603-604.) Thus, in effect appellant's sister did receive four houses to appellant's one.

II. IN PROVING A NET WORTH CASE, THE APPELLEE HAD THE BURDEN OF PROVING THAT APPELLANT HAD A "LIKELY SOURCE" OF TAXABLE INCOME FOR THE TAX YEARS IN QUESTION FROM WHICH THE JURY COULD HAVE INFERRED THAT APPELLANT'S NET WORTH INCREASES WERE DERIVED.

Appellee states: "It is, of course, true that, in establishing unreported income by the net worth method, the Government has the obligation to establish that the taxpayer is in an income producing business from which income could be derived". (Appellee's Brief p. 8.) Appellee concedes only the obvious namely, that before you can convict a man for income tax invasion you must show that he was receiving income. Appellee completely disregards the opinion of the Supreme Court in *Holland v. United States* 348 US 121, 99 L. Ed. Adv. Reports 127, wherein it was pointed out that the Government sustained the burden of proving not only the defendant's net worth increase for the year in question, but also prove that defendant's business was capable of producing income for the tax year in question sufficient to account for the increase in net worth. It is worth

noting that the Government proved that the defendant reported as income from his business in 1946 only 12½% of what the prior owner had reported from the same business in 1945. In 1947 the ratio was 12% and in 1948, the year in question, it was 26%. Further, the Government introduced evidence to show that Holland's business in 1948 had increased over what the prior owner had shown in 1945. As the Court said in the *Holland* case,

> "the net worth increase claimed by the Government could have come entirely from the unreported income of the hotel and still the hotel's total earnings for the year would have been only 73% of the sum reported by the previous owner for the comparable period in 1945".
>
> 348 US 121, 137, 99 L. Ed. Adv. Reports 127, 138.

In the instant case, the appellee's own calculations disprove appellee's contention that appellant's medical practice was a "likely source", in the language of the *Holland* case, of appellant's net worth increases in 1947 and 1948. Appellee's Exhibit 54 (Appendix A, Appellant's Opening Brief) shows that the appellee calculated appellant's taxable income in 1946 to be $6802.74, yet appellee claims that the same source of income yielded $36,931.22 in 1947 without any evidence in the record to show that appellant's medical practice had increased over what it was in 1946. In this context it is important to observe that the Government introduced no evidence aside from its net worth inferences in contradiction of the appellant's

own computations of his earnings in the tax years in question.

Appellee contends that "Appellant himself narrowed the issue by his pre-trial statements and by testimony at the trial to the contention that the expenditures made during the years 1947 and 1948 were made from some $40,000.00 he had saved in Wahoo, Nebraska, and brought to Fresno, and which was still on hand at the beginning of 1947. The impossibility of this was adequately demonstrated by evidence." (Appellee's Brief p. 10.) Appellee then cites *Friedberg v. United States,* 348 US 142, 99 L. Ed. Adv. Reports 140, in support thereof.

The difference between the *Friedberg* case and the case at bar is this: In the *Friedberg* case, Friedberg "stipulated virtually every other net worth issue out of the case" (348 US 142, 143, 99 L. Ed. Adv. Reports 140-141) leaving solely the question of whether Friedberg had $60,000.00 cash on hand to be included in the opening net worth statement prepared by the Government. In the case at bar, despite appellee's statement quoted above, appellant has stipulated to nothing insofar as the elements of the Government's proof of a net worth case are concerned. It is true that at trial it was a part of appellant's defense that he had a cash accumulation of $40,000.00 which he had brought with him from Nebraska. However, even if the jury disbelieved the appellant, that would not relieve the Government of its burden of proving that appellant's net worth increases in 1947 and 1948 arose from taxable income received in those years. Interestingly

enough, appellee in its brief makes the same error that we allege the trial court made in instructing the jury, namely, that the issue in the case was whether appellant had $40,000.00 in cash in his possession when he arrived in Fresno, California in 1942.

III. THE INSTRUCTION REGARDING CHARACTER EVIDENCE WAS INSUFFICIENT AND IT WAS ERROR TO REFUSE APPELLANT'S INSTRUCTION.

Appellee concedes that "evidence of good character, standing alone, might create a reasonable doubt even if the rest of the evidence created no doubt at all". (Appellee's Brief p. 15.) However, appellee says, while the foregoing is a correct statement of the law, a defendant who calls character witnesses on his behalf is not entitled to an instruction announcing that proposition of law even though he requests such an instruction. At page 15 of its brief appellee quotes from *Edgington v. United States,* 164 US 361, 41 L. Ed. 467, and then appellee says: "So, then, it is only necessary that the evidence of good character be before the jury, so that such evidence be given an opportunity to raise a reasonable doubt. It is not necessary that this be spelled out to the jury". This is as striking an illustration of a non sequitur as may be found in any elementary text book on logic. The language from the *Edgington* case, cited by appellee, plainly begins "If the Court had told the jury". How does a Court tell a jury except by its instructions to the jury? Yet counsel for appellee cites this

language for the proposition that the Court does *not* have to tell the jury about the significance of character testimony.

We do not argue that an instruction on character testimony must embody the language of the *Edgington* case *in haec verba.* But the instruction, if requested, should contain the essence of the holding in that case.

Sunderland v. United States, 19 Fed 2d 202;
United States v. Quick, 128 Fed 2d 832.

Does the charge as given by the trial Court in the case at bar meet that test? The full text of the Court's instruction on character witnesses is as follows:

> "You may consider in connection with this case the testimony of the so-called character witnesses which have been given and the witnesses who have testified as to the character of the defendant for truth, honesty and integrity in the community in which he lives. That evidence is to be considered by you along with all of the other evidence in the case in determining the guilt or innocence of the defendant."

Note, first, the characterization employed by the Court: "so-called character witnesses". Surely, the word "so-called" tended to discredit in the mind of the jury this type of evidence.

Secondly, the charging portion of the instruction gave no indication to the jury that, in the light of all the evidence, character testimony of itself might generate a reasonable doubt as to the guilt of appellant and yet it is agreed that such is the law.

Appellee cites *Grace v. United States,* 4 Fed 2d 658, 662, apparently for the proposition that to charge a jury directly that the good character of the defendant, taken with other evidence, might create a reasonable doubt would unduly accentuate evidence of good character. But in that case the Appellate Court said that the trial Court had "charged fully on the effect to be given testimony of good character and took occasion to say: 'This testimony may be considered in defendant's favor to the extent of a reasonable doubt' ". (4 Fed 2d at p. 662.) In effect, then, it would appear that the trial Court in the *Grace* case had given the substance of the Edgington rule of law.

In *Baugh v. United States,* 27 F. 2d 257, 261, relied on by appellee, the trial Court instructed as follows:

> "If you believe from the testimony that prior to the time of the alleged offense for which the defendants are now on trial, they bore a good reputation in the community where they resided for honesty and integrity, that is a circumstance in their favor which you will consider, together with all the facts and circumstances in evidence. It is competent testimony, and you should take it and consider it and give it such weight as appeals to your judgment."

The court on appeal held the instruction adequate. But the instruction in the *Baugh* case goes beyond the instruction given in the case at bar. At least the jury was instructed that character testimony was evidence in favor of the defendant and that the jury should

give it such weight as appealed to their judgment. Even this was not done here. In *Kalmanson v. United States,* 287 Fed. 71, 72, also cited by appellee, the trial court instructed:

> "You have a right to consider the good character of the defendant, if you find it is good, in making up your mind about the guilt or innocence of the defendant * * * The court charges you that if you do find the defendant has a good character, you have a right to consider that fact as a circumstance in this case, as to whether a man of good character would commit this kind—or any offense."

Here too, the charge as given and sustained on appeal goes beyond the charge given in the instant case and so, too, in *Haffa v. United States,* 36 Fed. 2d 1 also cited by appellee.

In conclusion, we say that while it is true that the Appellate Courts have refused to find reversible error where trial Courts have failed or refused to give instruction which overemphasized or unduly accentuated the significance of character testimony, such refusal does not obviate the necessity of an adequate charge within the meaning of the *Edgington* case. The charge was not adequate by that standard for it failed to set forth

> "the purpose and function of character evidence i.e. to generate reasonable doubt; the probative status of such evidence, i.e. that it be considered by the jury regardless of whether the other evidence in the case is clear or doubtful, and the possible effect of character evidence, i.e. that, whe

considered along with the other evidence in the case, if a reasonable doubt exists as to the defendant's guilt, he is entitled to an acquittal."

Sunderland v. United States, 19 Fed. 2d 202, 215.

IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION RESPECTING A "GIFT" OF $2500.00.

Appellee misunderstands the meaning of his own case in his discussion of the $2500.00 gift relative to whether it was a gift or income. For the interesting aspect is this: Appellee neither at the trial nor here argued that the money had not been received; its argument is that the money was taxable income and not a gift. However, the evidence shows that the $2500.00 as well as the other large gift mentioned in appellee's brief was received by appellant prior to 1947, the first year charged in the indictment. The only significance these monies can have then is in their effect upon appellant's opening net worth, i.e. his net worth as of January 1, 1947 and from that standpoint, *whether the money was received as a gift or as taxable income was immaterial.* All that was material was whether he had received it.

The only situation in which the distinction between gift and income would have become significant in this case would have been the situation where the evidence showed receipt of money from patients during the tax years charged in the indictment which the appellant labeled "gifts" and did not report as taxable in-

come but which a jury might have considered income. But the record is devoid of any evidence to show the receipt of such gifts in 1947 or 1948. In fact, such evidence as there is in the record plainly indicates that appellant received no gifts in 1947 or 1948. (R. Vol 8, page 909.)

Therefore, as we stated in our opening brief, the Court's instruction raised an issue for the jury where as a matter of law, none existed. It directed the jury's attention to an irrelevant transaction or event which reflected or might have tended to reflect adversely on the character of the appellant. Finally, the jury was told that it might consider in arriving at its verdict a fact question totally immaterial to the indictment on which appellant was tried.

V. THE COURT'S INSTRUCTIONS ON THE "NET WORTH" METHOD OF PROOF WERE NOT "LUCID, COMPLETE AND PROPER".

Appellee blandly says that this case is different from *Bihn v. United States,* 328 US 633, 90 L. Ed 1480, cited at pages 30-31 of Appellant's Opening Brief, but why it is different appellee does not make clear. The point in the *Bihn* case was that the trial Court, in its charge to the jury on a vital issue, cast its language in a form that omitted from the consideration of the jury, the issue of "reasonable doubt" and this was fatal even though the trial Court had instructed in general terms as to "reasonable doubt". In the instant case the trial Court instructed on a

essential issue, the issue of a cash accumulation, in terms of "resolving the truth" between the Government's contention and appellant's contention. But what if there were a reasonable doubt as to where the truth lie in this regard? The Court should have gone on to instruct the jury that in such eventuality it had to acquit. The failure to so instruct was not corrected by the general instructions that the Court gave as to "reasonable doubt", as the Supreme Court pointed out in the *Bihn* case.

Appellee answers our argument that the Court's instructions as set forth in pages 8-10 of our Opening Brief, foreclosed from the jury appellant's defense that the evidence of his earnings during the tax years in question supported the tax returns for those years, by saying that the instruction was intended as an "illustration". True, the Court did, at the conclusion of its remarks, say it was discussing the matter of the cash accumulation "not because I am emphasizing it, but merely by way of illustration". But the Court also said to the jury at the beginning of its remarks on the cash accumulation "you have to determine how you weigh the evidence as to these cash accumulations, *which are, in my judgment, the determining factor in arriving at a decision in this case* on the part of the jury".

Finally, appellee argues that from the instructions as a whole the jury could not have possibly doubted that the tax evasion as to which they were required to find was the evasion during the period charged in the indictment.

While a tax attorney might not have been confused by the Court's charge, the instructions were inherently confusing to a lay jury.

Consider, first, the Court's instruction as to the gift of $2500.00 previously discussed. Since the "gift" occurred prior to 1947, the fact that the jury was told that the question of whether the cash was a gift or income might enter into their decision could only confuse the jury as to what appellant was being tried for. Was he being tried for receiving income prior to 1947 which appellant had characterized as "gifts" and not reported as taxable income?

Then, the Court's instruction as to the $40,000.00 cash accumulation gave the jury the impression that if appellant did not have the $40,000.00 on January 1, 1947, he was automatically guilty of income tax evasion in 1947 and 1948 regardless of what his income might have been in 1947 and 1948.

Surely, as we said in our Opening Brief, where charges should be especially clear, appellant was entitled to have his requested instructions Nos. 30 and 4 given, or at least the substance of those instructions should have been given.

VI. THERE WAS PREJUDICIAL ERROR IN THE FORM OF THE QUESTIONS ASKED A CHARACTER WITNESS, ON CROSS-EXAMINATION, PARTICULARLY WHERE NO PRECAUTIONARY INSTRUCTION WAS GIVEN BY THE COURT.

Appellee suggests that "it is difficult to conceive ıow these "three little words 'did you know' could ıave prejudiced appellant in any way" (Appellee's 3rief p. 23.) Of course, it isn't the "three little vords" that prejudiced the appellant; it was the mplied statement of fact that appellant had been lischarged for dishonesty that constituted prejudicial rror.

In *United States v. Phillips,* 217 Fed 2d 435, a riminal prosecution for income tax evasion, the Gov-rnment on cross-examination, asked one of appel-ant's character witnesses whether he had heard that ppellant had been arrested for issuing checks to efraud. The Court held that even though the ques-ion had been couched in the form "did you hear" it vas prejudicial error where (1) The record was levoid of any showing that appellant had, in fact, een arrested and (2) no precautionary instruction vas given to the jury as to the purpose of this cross-xamination even though appellant had not requested uch an instruction.

In the instant case, there was no evidence in the ecord that appellant was discharged for dishonesty nd certainly no precautionary instruction of any ind was given to the jury as to the limited purpose f such cross-examination. (Contrast *Michelson v. Jnited States,* 335 US 569, 93 L. Ed. 168.)

To assert as appellee does, that the error committed by appellee was "inadvertent" does not in any way lessen the prejudicial effect of the error upon the jury, nor is an affidavit filed by the Government after the verdict was returned of any material significance.

As the Court said in *United States v. Phillips,* 217 Fed. 2d at page 444,

> "For aught that is disclosed by the record, the jury was at liberty to consider the damaging implication inherent in the Government's cross-examination for any and all purposes".

This is doubly applicable where the form of the question asked, "Did you know or have you heard", is not even within the scope of *Michelson v. United States,* supra.

Dated, San Francisco, California,
April 8, 1955.

Respectfully submitted,
DAVIS & COLVIN,
REYNOLD H. COLVIN,
SIDNEY FEINBERG,
Attorneys for Appellant.